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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 567

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL

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Title:

Veix v. *Sixth Ward Building and Loan Association of Newark, N. J.* 1

Official Report:
123 New Jersey Law Report, p. 356 2

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BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL

The appellant respectfully presents this brief under Rule 7, paragraph 3, in opposition to appellee's motion to dismiss for w.. t of jurisdiction.

Facts

The facts are stated in the appellant's statement of jurisdiction (p. 5, et seq.); the original complaint is set forth in full in the appellee's motion to dismiss (p. 6, etc.) and the original answer is set forth in full in appellee's motion to dismiss (p. 11).

The opinion of the New Jersey Court of Errors and Appeals is set forth in full as Exhibit A appended to our statement of jurisdiction (p. 15); the opinion of the New Jersey Court of Errors and Appeals in the case of *Bucsi* v. *Longworth Building and Loan Association*, 119 N. J. L. 120, 194 Atl. 857, is set forth in full as Exhibit B appended to our statement of jurisdiction (p. 16) and the opinion of the New Jersey Court of Errors and Appeals in the case of *Rocker* v. *Cardinal B. & L. Association*, 119 N. J. L. 134-194 Atl. 865, is set forth in full as Exhibit C appended to the statement of jurisdiction (p. 30).

The statutes involved are set forth in full in the appendix to this brief.

ARGUMENT

Point 1

The New Jersey Court of Errors and Appeals in fact did consider the 1937 revised statutes of New Jersey 17: 12-53, and decided said statute to be constitutional.

The third paragraph of the per curiam opinion of the New Jersey Court of Errors and Appeals in this cause, filed September 22, 1939 (p. 15, Jurisdictional Statement), is as follows:

> "Plaintiff's case is rested on the provisions of the statute which was controlling at the time of the purchase—Chapter 65, P. L. 1925; R. S. 17: 12-2, et seq. At that time the 1925 statute, *supra*, provided, *inter alia*, that the owner of such stock might have same redeemed for cash by giving a thirty day notice in writing and that such withdrawal should be paid by the association in the order in which notice had been received. On August 17, 1932, the plaintiff gave the defendant such written notice of withdrawal, and after the lapse of thirty days, demanded payment. But prior thereto the Legislature had amended the 1925 Statute by Chapter 102, P. L. 1932; R. S. 17: 12-53."
>
> (Now officially reported in 123 N. J. L. 356.)

The 1937 Revised Statutes of New Jersey, Title 1, Chapter 1, paragraph 5.1, is as follows:

> "1:1-5-1. *Citation of, pleading or otherwise referring to legislation contained in Revised Statutes.*—The legislation contained within any title, sub-title, part, chapter, article, section or group of sections of these Revised Statutes may be cited, pleaded or otherwise referred to by reference to such title, subtitle, part, chapter, article, section or group of sections of the "Revised Statutes," containing such legislation; and the use of the words "Revised Statutes" shall have the same effect as if the legislative title under which these Revised Statutes were adopted and the approval date thereof had been used.
>
> 'In any citation the abbreviation "R. S." shall be equivalent to "Revised Statutes", and sections of these Revised Statutes may be cited by section number only preceded by such abbreviation."

It is very evident that the New Jersey Court of Errors and Appeals had in mind the 1937 Revision, Title 17: Chapter 12, par. 53, when it made the statement in its opinion above quoted. In the next paragraph of its opinion where the court referred to the 1932 Statute, it had in mind the 1932 Statute, as amended, and as carried into the 1937 Revision. In fact, when the 1937 Revision was adopted, that superseded all of the prior legislation covered by the Revision. Therefore, at the time this case at bar was instituted, March 24, 1939, and likewise when it came before the New Jersey Court of Errors and Appeals, May 5, 1939, the 1937 Revision was the only existing statute on the subject, all of the prior statutes having been superseded by the 1937 Revision.

1937 Laws of New Jersey, Chapter 188, paragraph 1.

A. History of the New Jersey Legislation.

In order to present the history of this legislation clearly, we set out the various changes since Chapter 65 of the

Pamphlet Laws of New Jersey of 1925, was enacted. The 1925 Statute is set out in full in the Statement of Jurisdiction (R. 33) and in the appendix to this brief.

Section 52 of the 1925 Statute provided, among other things as follows:

> "* * * ; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

We especially point out that the Statute uses the words "*sue for and recover*". This completely disposes of appellee's argument that the legislature intended but an empty suit (R. 80, 81 and 82).

On April 22, 1932 the New Jersey Legislature amended Section 52 of the 1925 Act, to read as set forth in full in appellee's motion (P. 3-5), and in the appendix to this brief, the latter part of which provides:

> "A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid, so long as the funds in the treasury of such association are applied as required herein."

The important distinction between this and the 1925 Act is that it omits the provision of the 1925 Act which gave the right to a withdrawing member to institute suit and to recover the withdrawal value of his shares, if same were not paid in six months from the date of giving his withdrawal notice, and substituted therefor a withdrawal list, from which the withdrawing members were entitled to re-

ceive $500.00 in rotation each month, if funds were available for that purpose and if all matured shares are first paid in full. *It also contains a provision that no member shall have the right to bring suit against the association so long as the funds of the association are applied as required by this section.*

This was the act that was in effect when the New Jersey Court of Errors and Appeals decided the case of *Bucsi* v. *Longworth Building and Loan Association,* 119 N. J. L. 120; 194 A. 857.

But, on March 12, 1935 the New Jersey Legislature again amended Section 52 of the 1925 Act, by Chapter 59 of the Laws of 1935 set forth in the appendix to this brief. This statute is in different form, but in effect is the same as the 1932 Act except that it authorizes the payment of $50.00 in rotation to each member on the withdrawal list instead of $500.00 and goes into detail regarding the amount of funds which the directors may allocate for the payment of withdrawals and maturities. *The 1935 Act also contains the provision that no member shall have the right to bring suit against the association so long as the funds of the association are applied as required by this section.* We do not set out this act because it was superseded by the 1936 Act following.

Again the Legislature of New Jersey on May 26, 1936 amended Section 52 of the 1925 Act by Chapter 118 of the Laws of 1936 set forth in the appendix to this brief, making minor changes to clarify the position of withdrawing members on the withdrawal list. *This statute likewise did away with the right of the shareholder to sue for and recover the withdrawal value of his shares if the same be not paid within six months from the date of withdrawal notice, and specifically provided that no member should have the right to bring suit so long as the funds of the association should*

be applied as required by that section. We do not set forth this act because it was carried into the 1937 Revision, as 17: 12-53. The 1937 Revision was enacted on December 20, 1937 (not 1927 as stated by appellee) and became effective July 4, 1938 (R. S. 1: 2-3). In the 1937 Revision, section 52 of the 1925 Act as amended by Chapter 118 of the Laws of 1936 was carried verbatim (except for three very minor changes in paragraph "f" thereof) as title 17: Chapter 12, paragraph 53. This is set forth in full in the Statement of Jurisdiction (R. 31-32) and in the appendix to this brief. Therefore, Section 17: 12-53 was not an original enactment as stated by the appellee in its motion to dismiss. In fact, the objectionable provision had been in existence since 1932, namely; depriving of the withdrawing shareholders of the right to bring suit and recover the value of the shares, after his withdrawal notice had been on file for six months. Furthermore the identical statute was in effect prior to the revision, namely since the enactment of Chapter 118 of the Laws of 1936.

There is no marked difference in substance so far as this appeal is concerned, between the acts of 1932-1935, 1936 and 1937 Revision, and they are all repugnant to the Federal Constitution.

The Supreme Court of the United States has declared the rule to be that upon a revision of Statutes the mere change of phraseology will not be construed a change of the law, unless such phraseology evidently purports an intention in the Legislature to work a change.

McDonald v. *Hovey*, 110 U. S. 619, 629.

When the *Bucsi* case was instituted and when it came before the New Jersey Court of Errors and Appeals the objectionable provisions were contained in the 1932 Statute, but when the case at bar was instituted and came before the New Jersey Court of Errors and Appeals, the same objec-

tionable provision had been carried forward, through the various amendments into the 1937 Revision. The 1937 Revision was the only Statute in New Jersey on this subject when the case at bar was instituted, and when it came before the New Jersey Court of Errors and Appeals for decision.

The Legislature of New Jersey in 1937 had expressly said that the Revised Statutes, except in the sole case of inconsistency, shall be construed as a continuation of prior laws. "R. S. 1:1-4" which provides as follows:

> "The provisions of the Revised Statutes not inconsistent with those of prior laws, shall be construed as a continuation of such laws."

R. S. 1; 1-5 provides the following:

> "The classification and arrangement of the several sections of the revised statutes have been made for the purpose of convenience, reference and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn therefrom."

B. In Interpreting the Meaning of the Opinion of the Highest Court of a State, this Court Looks Not Only to the Opinion Itself, But Also to the Entire Record.

New York ex rel. Bryant v. *Zimmerman et al.*, 278 U. S. 63: 67.

St. Louis Iron Mountain & Southern Railway Company v. *Starbird, Admr. of Miller*, 243 U. S. 593; 599.

McCullough v. *Virginia*, 172 U. S. 102, 116, 117.

Williams v. *Bruffy*, 102 U. S. 248.

The appellant's original complaint is set forth in full in appellee's motion to dismiss (P. 6). Likewise the appellee's answer thereto (P. 11). In paragraph 11 of his original complaint (P. 8-9) appellant refers to 17-12-53 of the 1937 Revision as being in violation of the Federal Consti-

tution; the appellee in his answer filed in this cause at page 12 of the motion to dismiss specifically refers to 1937 Revised Statutes 17: 12-53 and quotes that portion of it which prohibits a suit by a withdrawing shareholder so long as the association complies with that section. In fact R. S. 17: 12-53 is the very defense set up by the appellee in its original answer to the original complaint (P. 12, motion to dismiss).

The appellant's Grounds of Appeal to the New Jersey Court of Errors and Appeals specifically sets forth R. S. 17: 12-53 and alleges that Statute to be unconstitutional within the inhibitions of Article 1 Section 10 of the Constitution of the United States of America, and Section 1 of the 14th Amendment of the Constitution of the United States of America. (P. 11, Jurisdictional Statement.)

The appellant in his brief filed in the New Jersey Court of Errors and Appeals in this cause, sets forth in full 1937 Revised Statutes 17: 12-53, the appellee in its brief filed in that appeal specifically refers to the 1937 Revision 17: 12-53 and the New Jersey Court of Errors and Appeals specifically refers in its opinion to Revised Statutes 17: 12-53 (P. 14-15, Jurisdictional Statement). The New Jersey Court of Errors and Appeals also refers to Chapter 102 of the Laws of 1932 but clearly this must be read in connection with its prior paragraph where it also refers to R. S. 17: 12-53. In fact they are synonymous, in that both of them deprive the appellant of his right given by the 1925 statute to institute suit to recover the withdrawal value of his shares if the same is not paid within six months of the date of giving the withdrawal notice. There is no marked difference in substance between the 1932 Act and the corresponding section of the 1937 Revision.

The New Jersey Court of Errors and Appeals well knew that the 1932 Statute, as such, had been superseded by the subsequent legislation as finally adopted in the Revision of

1937. It well knew that it was R. S. 17: 12-53 that was before it in the case at bar. It is quite evident that that Honorable Court intended to pass upon the 1932 Statute as subsequently amended by the 1935 and 1936 Acts, and as carried into the 1937 Revision as R. S. 17: 12-53.

In *New York Ex. Rel. Bryant* v. *Zimmerman et al. supra*, Mr. Justice Van Devanter on page 67, said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential but only that the claim of invalidity and the ground therefor be brought to the attention of the State Court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

We desire to make it clear that appellant's charges of unconstitutionality are directed at the legislation in question only as it affects appellant; and we do not suggest that the statute is invalid prospectively. Appellant insists only as retroactively applied to appellant, who bought and paid in full for his shares prior to the enactment of the offending provisions, such legislation is invalid, unjust, discriminatory, arbitrary, unreasonable and unconstitutional. We are not concerned with the contracts of those members who subscribed for their shares after the enactment of the offending provisions.

Point II.

The case at bar involves definite contract obligations and rights of property.

The New Jersey Court of Errors and Appeals has chosen to rest its decision in this case upon *Bucsi* v. *Longworth*

Building and Loan Association, 119 N. J. L. 120. That case rested squarely upon the proposition that the statute there in question (Chapter 102 of the Laws of 1932, now R. S. 17: 12-53) deprived the appellant of valuable contract and property rights, which he had enjoyed prior to its enactment, but justified the subsequent statute as a proper exercise of the police power of the State.

The New Jersey Court of Errors and Appeals, moreover, in 1913 declared the rights of a withdrawing shareholder under a prior statute which was similar to the 1925 statute by asserting that the right to sue or set off the withdrawal value applied only to solvent associations. This was decided in *French* v. *Wolfson*, 88 N. J. L. 669; at page 671 the court said:

> "The argument made is that section 39, among other things, provides that a shareholder who has given notice of withdrawal may sue for and recover the withdrawal value of his shares in any such association, in any court of competent jurisdiction if the same is not paid in six months from the date of the giving of said notice of withdrawal, a provision not contained in the old act, and hence, by reason of this change in the act, Gaskill *v.* Polhemus is not applicable to the case sub judice: But we think otherwise. *No doubt that this change gave the withdrawing stockholder a right to sue for the book value of his shares at the expiration of six months from the time of giving notice of his withdrawal.* This clearly negatives any right to sue in advance of the expiration of the six months and as a set off is, in effect a counter suit, no such set off could be permitted until the six months had expired. Now, though the six months have expired, the situation has changed and the dissolution of the association has begun. We think the rights of the parties must be determined as of the time when the stockholders resolved on dissolution, since the statute contemplates that the withdrawals shall be withdrawals from a live concern and not from a defunct one. (Italics ours.)

The case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189, like the case at bar, deals with a solvent association.

In the case of *Bedford* v. *Eastern Building and Loan Association*, 181 U. S. 227, 240, this Honorable Court in holding that the subscription to building and loan shares constitutes a contract with the association said:

> "* * * By his subscription to stock of the association Bedford became a member of the association—bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association. Each acquired a right to what the other promised, and there were all the elements of a contract."

The courts of New Jersey have held that the offending provisions in the New Jersey Statute are quite similar to the Louisiana Statutes that were under consideration in the Treigle case, and adopt the logic of the Louisiana Supreme Court.

In *Fornataro* v. *Atlantic Coast Building and Loan Association*, 10 N. J. Misc. 1248, 163 A. 240, the Supreme Court of New Jersey sustained Chapter 102 P. L. 1932, as constitutional upon the grounds that the act purports to deal with an existing emergency.

The *Farnataro* case, *supra*, was adopted in *Treigle* v. *Acme Homestead Association*, 181 Louisiana 941 (160 Southern 637), wherein Chief Justice O'Neill said (page 644):

> "Our attention is called to similar statutes which have been enacted in many other states during the last few years of the financial depression; and we are not aware of any instance where provisions such as are questioned in this case have been declared unconstitutional by a court of last resort. In Fornataro and

Romano *v.* Atlantic Coast Building and Loan Association, 16[illegible] A. 240, 10 N. J. Misc. 1248, the plaintiffs being withdrawing shareholders in the association contended that a statute of 1932 (Chapter 102 P. L. 1932, p. 175) (N. J. St. Annual 1932, Sec. 27-R 52) similar to the Louisiana Statute of 1932 could not deprive them of their rights acquired under a previous statute (Chapter 65 P. L. 1925 52, p. 212, Comp. St. Supp. 1930, 27-R. 52) without violating the obligations of the contract between them and the association. The Supreme Court of New Jersey ruled against the plaintiffs' contention * * *."

In the case of *Rocker* v. *Cardinal Building & Loan Association*, 13 N. J. Misc. 411, 179 A. 667, affirmed by the Court of Errors and Appeals, 119 N. J. L. 134, 194 A. 865; the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals adopted the opinion in the Louisiana *Treigle* case. Judge Cleary said:

"* * * Treigle *v.* Acme Homestead Ass'n (Louisiana Supreme Court, decided March 4, 1935). This case deals with facts and statutes quite similar to those under consideration in the case at bar. The logic of that decision is apparent, is applicable to the present situation, and is adopted by this Court. See, also Building and Loan Annals, 1932 pages 299, 307, for the first and excellent rules of law enunciated in the Fornataro and Treigle cases and upon which this decision is based."

We now have a situation where Louisiana Supreme Court first adopts the view as expressed in the *Fornataro* case, and in a decision by the New Jersey Supreme Court in *Rocker* v. *Cardinal Building and Loan Association (supra)*, affirmed by the New Jersey Court of Errors and Appeals, the Court adopts the logic of the opinion in the Louisiana *Treigle* case, which was reversed by the Supreme Court of

the United States, 297 U. S. 189. Quoting Mr. Justice Roberts, pages 194-196:

> "The Statute impairs the obligation of the appellant's contract and destroys his vested rights in contravention of Articles 1, Sec. 10 and Amendment 14, Section 1, of the Constitution. * * * The Statute merely attempts for no discernible public purpose, the abrogation of contracts between members and the association lawful when made."

The legislation here attacked deprives the appellant of a contractual vested right, and is therefore unconstitutional.

A. The Appellant has a Vested Contract Right Which Cannot be Impaired by Subsequent Legislation.

The appellee tries to distinguish the New Jersey Statute by stating that our 1925 Statute affords a "statutory privilege" and not an obligation of contract. It attempts to sustain that theory by a lengthy discourse on "legislative history" and "legislative philosophy."

But such a theory has been long since exploded by this Honorable Court.

It is not a mere legislative gratuity or privilege that is conferred by P. L. 1925, Chapter 65, Sections 49 and 52. We are dealing with a contractual relation existing between the corporation and a member, the law existing at the time of the contract being an integral part of it.

Appellant, upon paying his money to the association and accepting its prepaid shares under the 1925 Statute then in force became vested with a valid contract and a valuable property right. It did not arise upon the constitutional rule of law, but upon the contractual liability created under and in pursuance of the Statute then in force.

Coombes v. *Getz*, 285 U. S. 434, 76 L. Ed. 866;
Ettor v. *Tacoma*, 228 U. S. 148, 156, 57 Ed. 773;
Pacific Mail S. S. Co. v. *Joliffe*, 69 U. S. 450 (2 Wall.).

In case of *Ettor* v. *Tacoma, supra*, the State of Washington had by statute imposed a liability on municipal corporations in favor of property owners sustaining consequential damages to their property as a result of street paving operations. While the statute was in force, suit was brought to recover damages inflicted upon an abutting property in consequence of street grading, done by direction of the City of Tacoma. While the suit was being heard, the statute creating the liability was repealed, and the trial court directed a verdict in favor of the City, on the theory that the right of action was statutory, and fell with the statute, there being no saving clause. This judgment was affirmed by the State Supreme Court; it was reversed, the Court saying:

> "The necessary effect of the repealing Act, as construed and applied by the Court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the City to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,—and a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

In the case of *Coombes* v. *Getz, supra*, there was presented a controversy wherein a creditor had brought suit against a director of a corporation, claiming liability by the director for a bill of goods which the creditor had sold to the corporation on open account. At the time the bill of goods was sold, there was a constitutional provision in force in the State of California, which made directors of corpora-

tions liable in the event of failure to pay corporate indebtedness by virtue of embezzlement of corporate funds. In this case, the Supreme Court of California held, that the director was not liable, because the constitutional provision creating the liability had been repealed, before the suit of the creditor against the director was reduced to judgment. The Supreme Court of the United States held, however, that the directors, in taking their oath of office, impliedly accepted the obligations imposed by the constitutional provision of the California Constitution; and since the merchandise had been sold to the corporation while this rule of law was in full force and effect, a contract right in the provisions of law was created, which it was incompetent for the State to repeal, and thus to impair the obligation of the creditor's contract.

In each of the two cases just cited, it was contended that the obligation claimed to have been impaired by the subsequent legislation was an obligation imposed by statute merely and subject to legislative repeal, and was not a contractual obligation.

Mr. Justice Sutherland in *Coombes* v. *Getz, supra,* thus disposes of this contention, at page 442.

> "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor, which in every sense was a property right."

The Court in *Pacific Mail S. S. Co.* v. *Joliffe*, 69 U. S. 450 (2 Wall) expressed the same thought in these words, at page 457:

> "The claim of the plaintiff below for half-pilotage fee, resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him, his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

Indeed, the fallacious theory advanced by the appellee was raised in the *Treigle* case almost from its inception. An inspection of the record in that case, on file in the library of this Honorable Court discloses that Judge Gleason, in his opinion at page 19 of the Treigle transcript adverts to the "purely statutory" theory advanced by the defendants, and discards it. In the brief of the appellee filed in this Court in the *Treigle* case (page 32) the heading is found as follows "A shareholder's right of withdrawal in a building and loan association is purely statutory, is always within the control of the Legislature and may be altered by the legislature in its discretion. It has none of the characteristics of a conventional agreement, or a vested right."

Again, in the brief Amicae Curiae, in behalf of the U. S. Building and Loan League in the *Treigle* cases filed in this Honorable Court, the greater part of that brief is written in an attempt to sustain their fallacious argument that the appellant's rights are not contractual but purely statutory

and can be changed or altered at the will of the Legislature.

Again, in the petition for rehearing filed by John Warren, in the *Treigle* case in this Honorable Court, in behalf of the Banking Departments of the States of Indiana, Illinois, Wisconsin and Texas, he argues that the Louisiana statute accords but a privilege to the withdrawing shareholder and not a contractual or vested right.

Thus it appears that this matter of "statutory privilege" as distinguished from a contractual and vested right was fully presented to this Honorable Court in the *Treigle* case and we respectfully submit that the decision in that case 297 U. S. 189 lays that fallacious notion to rest for all time in the following words at page 194:

> "The statute impairs the obligation of appellants' contract and destroys his vested rights in contravention of Article 1, #10 and Amendment 14 #1 and the Constitution."

Point III

The police power does not save the legislation from unconstitutionality.

We consider this point to have been set at rest for all time in this Honorable Court by its decision in the case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189—in these words:

> "The Legislature has no greater power to interfere with the private contracts of such corporations, or vested rights of their stockholders as such, under the pretext of public necessity, than it would have to attempt the same ends in a case of a private corporation."

The New Jersey Court of Errors and Appeals decided the case of *Bucsi* v. *Longworth Building and Loan Association* (*supra*), after the decision in the *Treigle* case was rendered by this Honorable Court, and in fact in the *Bucsi* case they

mention and quote from the Treigle decision. However, in the *Bucsi* case they say: 119 N. J. Law 120:127.

> "It may very well be that the statute in Louisiana was not passed 'for an end which is in fact public,' but the situation which faced our Legislature in 1932, if allowed to run unregulated to its apparent and ultimate economic conclusion, would have affected adversely every person in this state."

The Court then proceeds to recite the economic conditions as they are alleged to have existed in New Jersey in 1932 and proceeds as follows at page 130.

> "The structure of the tax base and the widespread membership in building and loan Associations, and the fact that the value of the real estate mortgages and real property owned by such associations represent a high percentage of the total value of all taxable real estate in the state, creates a situation which is peculiar to this state. It does not appear from the record of briefs in the *Treigle* v. *Acme Homestead Ass'n. supra* that a comparable situation exists in Louisiana."

It is respectfully submitted, however, that these very questions and proofs were before this Honorable Court when the *Treigle* case was argued. An examination of the record and briefs in the *Treigle* case on file in the Library of this Honorable Court discloses that the original answer filed by the defendant in the court of first instance under paragraph XV (Treigle record page 13, 14, 15, 16 and 17), are concerned exclusively with a recital of the adverse effects of the economic depression in Louisiana upon the building and loans of that state. Judge Gleason, sitting in the Court of first instance nevertheless sums it all up in these words (Treigle record 30).

> "If these provisions are defensible under our constitutional guarantees, one might as well write out of

the constitution these fundamental guarantees of government, and leave to the whims of the respective legislature the destiny of all contractual relations."

The opinion of the Supreme Court of Louisiana in *Treigle* vs. *Acme Homestead Association,* 181 La. 941, treats this situation.

Again the economic situation in Louisiana was discussed at page 13 of the appellee's brief in the *Treigle* case, and in his petition for re-hearing, the appellee lays stress upon the economic effect of the depression upon Building and Loan Associations in Louisiana. (Treigle Record 5 and 8).

An examination of the Treigle record and briefs, therefore discloses that when the New Jersey Court of Errors and Appeals in the *Bucsi* case stated that it does not appear from the records and briefs in *Treigle* v. *Acme Homestead Association, supra,* that a comparable situation exists in Louisiana, that honorable court was in error. In fact, the record and briefs in the *Treigle* case disclose that the identical situation which the New Jersey Court of Errors and Appeals alleged to exist in New Jersey was also alleged by the appellee in the *Treigle* case to exist in Louisiana and was even set forth in detail in the very first pleading filed by the appellee in the *Treigle* case. Furthermore, the New Jersey Court of Errors and Appeals passed upon this very question prior to the *Bucsi* case of *Braunstein* v. *Jersey City,* 98 N. J. L. 479 (page 480).

"* * * The arguments of emergency and 'police power' alluded to in the other case are reiterated here * * * are authority for the validity of the statute under which exemption from tax is now claimed. On this phase of the case it is sufficient to say that the statutes involved in those decisions related in no way to tax exemption, nor to any repugnancy of a state statute to a plain mandate in a state constitution, but to statutes affecting the contract relation of landlord and tenant,

with which we are in no way concerned at this time, and hence we deem them inapplicable and irrelevant to the question before us, which is, whether the Exemption Act of 1920 is plainly in violation of the constitutional provision that property shall be assessed for taxation under general laws and by uniform rules according to its true value, as it manifestly is, can be supported on any theory of 'emergency' or of so called 'police power.' *As to this, we specifically concur in the view expressed by the Supreme Court in the Koch case that a pressing emergency is no ground for violation of a constitutional provision, and that the 'police power' broad as it is, cannot be exercised in defiance of constitutional limitations.'* (Italics ours.)

Finally, upon this phase of the case, we would refer to the long line of decisions in which statutes of this sort, which have sought under the guise of police power to take property rights from, or to impair the contract obligations of one person or class of persons for the benefit of another person or class of persons have repeatedly been held to be unconstitutional.

The Minnesota Moratorium case (*Home Building & Loan Association* vs. *Blaisdell*, 290 U. S. 398) cites and discusses them all, from *Bronson* v. *Kinzie*, 1 Howard 311, on down to the present time; and points out that the protection of one class of persons at the expense of another class may only be justified as emergency legislation if reasonably conditioned. If the legislation is temporary and consideration is allowed for temporary taking of property, the legislation may be constitutional.

The New Jersey Revised Statutes 17: 12-53 is a part of this permanent statutory law of the State and not emergency legislation.

In fact, the New Jersey Court of Errors and Appeals in *Bucci* v. *Longworth Building and Loan Association*

(*supra*) specifically admits that this legislation is out of the class of mere emergency legislation.

It should be pointed out that nowhere in the record in the case at bar is it alleged or even suggested that a situation exists *now* in New Jersey similar to that which was alleged to have existed in New Jersey and in Louisiana in 1935-1936, when the *Bucsi* case was decided. Over three years have elapsed since that decision was rendered.

The silence of the appellee in this regard bespeaks of but two alternatives: (1) Either the appellee concedes that the reasoning in the *Bucsi* case in this regard was unsound when made, or (2) the appellee concedes that the economic situation in New Jersey regarding Building and Loans as alleged in the *Bucsi* decision in 1936 has *now* materially improved, or has *now* completely corrected itself.

Conclusion

It is unfair for the appellee to charge that we desire to wreck the appellee building and loan association (P. 1822 motion to dismiss). We emphatically disavow any such purpose or intention. The appellant invested his money in this building and loan association in 1928 and 1929 and under the statute and by-laws then existing, he had the right to the repayment of his money, with interest, upon giving 30 days written notice to that effect. That is his contract, and he would not have invested his money on any other agreement. The appellant has not "fallen by the wayside" (P. 21—motion to dismiss); he did not agree to continue his investment until all instalment shares had matured and been paid (P. 22—motion to dismiss); he did not breach his contract with the association (P. 22—motion to dismiss); he did not agree to "remain in to the end, bearing his part of all its burdens, and finally sharing all

its profits in the same proportion" (P. 22—motion to dismiss). Appellant is not an instalment shareholder. His contract entitles him to receive his money invested on thirty days notice, with interest at six per centum per annum, no more, and no less. He was in dire need of his money in 1932, and then gave his written notice of withdrawal in accordance with the contract he made; thirty days thereafter he demanded his money and six months thereafter and on many other occasions he demanded it, and although the appellee was at all times solvent and had sufficient funds on hand in cash to pay the same, payment was refused (P. 8-9—motion to dismiss). At no time since 1932 has the appellant been "silent" (P. 25—motion to dismiss). The appellee has constantly refused to honor its honest contractual obligations, unjustly excusing its breach of contract by pointing to the subsequent unconstitutional statutes of New Jersey. The appellee points out that "the operation of the building and loan associations in this State during the latter part of the last century had been so loose and utterly devoid of any consideration of the purpose for which they were created and the rights of the subscribing members that the situation was a public scandal" (P. 16—motion to dismiss). But the appellee fails to mention the "public scandal" as it exists to-day in New Jersey! Many of these solvent associations in New Jersey have been permitted to continue in business, make new loans and operate in the usual way, and, being solvent at the same time have been permitted to dishonor their solemn contracts regarding withdrawals. The appellee has been forced to wait for over 7 years and has not even received his 6% interest! The pressed and needy withdrawing shareholders have been left to the mercy, whims and caprice of the directors, whose power in this regard has been exalted in this State above that of the Federal Constitution.

Appellant disavows any desire or purpose to "wreck" any of these associations. The appellant's charges of unconstitutionality are directed solely at the legislation as it affects the appellant; we do not suggest that the statute is invalid prospectively. We are not concerned with contracts of others who subscribed for shares after the enactment of the offending statutes nor of borrowing shareholders. We insist only as retroactively applied to appellant who bought and paid for his prepaid shares in full prior to the enactment of the offending provisions (and without any right on his part to share in the general profits of the association, but with the express right to receive his principal and six per centum per annum interest on his investment upon giving thirty days notice), the subsequent legislation of 1932, 1935, 1936 and 1937 is, as to him unconstitutional, unjust, discriminatory and a violation of his contract and of his vested rights.

It is respectfully submitted that this Honorable Court has complete jurisdiction, that the appellee's motion to dismiss should be denied and this appeal be allowed to proceed.

WALTER P. REILLY,
Attorney for Appellant.

WALTER P. REILLY,
Of Counsel with Appellant.
JAMES L. HANDFORD,
Of Counsel with Appellant.

APPENDIX

By-Laws of the Sixth Ward Building and Loan Association of Newark, New Jersey (R. 67)

ARTICLE XIX. Prepaid shares.

Section 2.—Prepaid shares shall bear interest payable semi-annually on the First day of May and November of each year, at such rate as the Board of Directors may determine at date of issue and may be withdrawn by the holder thereof, upon giving Thirty days written notice prior to any regular meeting of the Association.

Legislative Acts of New Jersey

An Act Concerning Building and Loan Associations (Revision of 1925), N. J. Pamphlet Laws of 1925, Chapter 65, Section 49, and 52 pp. 211, 212, 213.

49. How withdrawn.

The shares of every such association of this State, or doing business therein, may be withdrawn by the holder at any time, by giving such written notice as may be provided for in the constitution or by-laws, not to exceed thirty days; if the withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares, less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value; in case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such withdrawal value and the difference only paid to such member; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section.

52. Payment of withdrawals.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been re-

ceived, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal.

Chapter 102 of New Jersey Pamphlet Laws of 1932, pp. 175, 176.

Chapter 102.

An Act to amend an act entitled "An Act concerning building and loan associations (Revision of 1925)," approved March twelfth, one thousand nine hundred and twenty-five.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section fifty-two of the act of which this act is amendatory, be and the same is hereby amended so that the same shall read as follows:

52. Payment of withdrawals.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received but not more than one-half of the total receipts of any such association in any month, as income on investments authorized by section twenty-six hereof, dues on shares pledged with such association to secure loans authorized by paragraphs II and V of section twenty-six hereof and repayment of loans authorized by paragraphs IV and V of section twenty-six hereof shall be required to be used for the payment of withdrawals, without the consent of the board of directors; provided however that if in any one month the funds of the association required to be available

for the payment of withdrawals together with any other funds made available for such purpose by its board of directors, are at any time insufficient for the payment of all withdrawals which have been requested, then the right of any withdrawing member to priority of payment of the withdrawal value of his shares in the aforesaid order, shall be only to the extent of five hundred dollars in any one month and if all withdrawing members have received payments in full or on account of their withdrawals to the extent of five hundred dollars in any month and there is then a balance of such funds available for the payment of withdrawals then said order of priority of payment, to the extent of five hundred dollars, shall continue to apply until such balance is exhausted; and no withdrawals shall be paid if the funds available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within thirty days after maturity; and members who have thus requested payment of their matured shares shall have a right to such payment prior to the rights of members who have requested payment of withdrawal value of their shares. A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid, so long as the funds in the treasury of such association are applied as required herein.

2. This act shall take effect immediately.

Approved April 22, 1932.

Chapter 59 of the New Jersey Pamphlet Laws of 1935 (Section 52), pp. 153, 154, 155.

Section fifty-two of the act of which this act is amendatory be and the same is hereby amended to read as follows:

52. Payment of maturities and withdrawals.

Maturities and withdrawals shall be paid in the manner and subject to the limitations provided herein:

(a) Maturities shall be paid in the order in which they become due except as provided herein and withdrawals

shall be paid in the order in which notices of withdrawal shall have been filed except as provided herein; and

(b) The maturities of any one month shall be paid before the maturities of subsequent months; and

(c) One-third of the net receipts of any such association in each fiscal month shall be made available, so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts", as used in this section, shall be construed to mean the monies, other than borrowed monies, received by any such association less monies used for operating expenses, monies used to pay creditor obligations, monies used for conservation, preservation or protection of the property and assets of such association, and monies reserved for any of such purposes; and

(d) If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds, if any, made available for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then due and payable, the board of directors of such association shall, so far as possible pay out of such funds, on account of the sum due on each such withdrawal, in the order in which the notices shall have been filed, the sum of fifty dollars or the balance due thereon, whichever is less and, if the available funds shall not thereby be exhausted or become inadequate, shall, so far as possible, again pay on account of each such withdrawal, in said order, the sum of fifty dollars or the balance due thereon, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawal obligations in the same manner beginning with the withdrawal next following the one on account of which the last such payment was made; and

(e) No member to whom any such association shall be obligated for the payment of any maturity or withdrawal

shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; and

(f) The board of directors of any such association shall have the right, in their discretion, to make available additional funds other than those required in subdivision (c) of this section for the payment of maturities and withdrawals; provided however, that no more than one-third of the net receipts, as defined in sub-division (c) hereof shall be used for the payment of withdrawals while maturities remain unpaid; and provided further that borrowed monies shall not be used for the payment of withdrawals while maturities remain unpaid.

Chapter 118 New Jersey Pamphlet Laws of 1936 (Section 52) pp. 295, 296, 297.

Section fifty-two of the act of which this act is amendatory be and the same is hereby amended to read as follows:

52. Payment of maturities and withdrawals.

Maturities and withdrawals shall be paid in the manner and subject to the limitations provided herein;

(a) Maturities shall be paid in the order in which they become due except as provided herein and withdrawals shall be paid in the order in which notices of withdrawal shall have been filed except as provided herein; and

(b) The maturities of any one month shall be paid before the maturities of subsequent months; and

(c) One-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts," as used in this section, shall be construed to mean the monies, other than borrowed monies, received by any such association less monies

used for operating expenses, monies used to pay creditor obligations, monies used for the conservation, preservation or protection of the property and assets of such association, and monies reserved for any of such purposes; and

(d) If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds, if any, made available for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then due and payable, the board of directors of such association shall, so far as possible, pay out of such funds, on account of the sum due to each member who has filed notice or notices of withdrawal, without regard to the fact that such notice or notices shall have been filed by such member on more than one share account, in the order in which such notices shall have been filed, the sum of fifty dollars or the balance due to such member, whichever is less and, if the available funds shall not thereby be exhausted or become inadequate, shall, so far as possible, again pay on account of the sum due to each such withdrawing member, in said order, the sum of fifty dollars or the balance due to such member, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawing obligations in the same manner beginning with the withdrawal of the member next following the one on whose account the last such payment was made; and in the event that such member shall have filed more than one notice of withdrawal, his place in the order of payment shall be as of the date and time of the first notice filed by him; and

(e) No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; and

(f) The board of directors of any such association shall have the right, in their discretion to make available addi-

tional funds other than those required in subdivision (c) of this section for the payment of maturities and withdrawals: provided however, that no more than one-third of the net receipts as defined in subdivision (c) hereof shall be used for the payment of withdrawals while maturities remain unpaid; and provided, further that borrowed monies shall not be used for the payment of withdrawals while maturities remain unpaid.

Chapter 188 of the New Jersey Pamphlet Laws of 1937 p. 832

An Act to establish all the public statute law of a general nature of the State of New Jersey in the form of a revision, consolidation and compilation, to be known as the Revised Statutes.

Be it Enacted by the Senate and General Assembly of the State of New Jersey:

1. The revision, consolidation and compilation prepared under the direction of the Legislature by the Revision Commission appointed under chapter seventy-three of the laws of one thousand nine hundred and twenty-five presented to the Legislature by the Commission upon the twentieth day of December, one thousand nine hundred and thirty-seven, be and the same is hereby adopted as all the public statute law of the State of New Jersey of a general nature.

2. This statute and the revision, consolidation and compilation so adopted as aforesaid and incorporated herein shall in all respects, and whether revision, consolidation or compilation, be known as the Revised Statutes.

3. The Revised Statutes as hereinbefore defined and as hereinafter enacted, shall take effect immediately.

And be it further enacted, That
Approved December 20, 1937.

Revised Statutes of New Jersey of 1937—Title 17: Chapter 12, par. 53

Payment of maturities and withdrawals

Maturities and withdrawals shall be paid in the manner and subject to the limitations provided herein.

a. Maturities shall be paid in the order in which they become due except as provided herein and withdrawals shall be paid in the order in which notices of withdrawal shall have been filed except as provided herein; and

b. The maturities of any one month shall be paid before the maturities of subsequent months; and

c. One-third of the net receipts of any such association in each fiscal month shall be made available, so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts" as used in this section shall be construed to mean the moneys, other than borrowed moneys, received by any such association less moneys used for operating expenses, moneys used to pay creditor obligations, moneys used for the conservation, preservation or protection of the property and assets of such association, and moneys reserved for any of such purposes; and

d. If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds if any, made available for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then due and payable, the board of directors of such association shall so far as possible, pay out of such funds, on account of the sum due to each member who has filed notice or notices of withdrawal, without regard to the fact that such notice or notices shall have been filed by such member on more than one share account, in the order in which such notice shall have been filed, the sum of fifty dollars or the balance due to such member, whichever is less and, if the available funds shall not

thereby be exhausted or become inadequate, shall, so far as possible, again pay on account of the sum due to each such withdrawing member, in said order, the sum of fifty dollars or the balance due to such member, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawal obligations in the same manner beginning with the withdrawal of the member next following the one on whose account the last such payment was made; and in the event that such member shall have filed more than one notice of withdrawal, his place in the order of payment shall be as of the date and time of the first notice filed by him; and

e. No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; and

f. The Board of directors of any such association shall have the right in its discretion, to make available additional funds other than those required in paragraph "c" of this section for the payment of maturities and withdrawals; but no more than one-third of the net receipts as defined in said paragraph "c" shall be used for the payment of withdrawals while maturities remain unpaid. Borrowed moneys shall not be used for the payment of withdrawals while maturities remain unpaid.

Source L. 1925, c. 65, Sec. 52, p. 212, as am. by L. 1932, c. 102 sec. 1, p. 175, L. 1935, c. 59, sec. 11, p. 153, L. 1936, c. 118, Sec. 4, p. 295.

Revised Statutes of New Jersey of 1937 Title 1: Chapter 1. Par. 4

1:1-4. Construction as continuation of heretofore existing laws. The provisions of the Revised Statutes, not inconsistent with those of prior laws, shall be construed as a continuation of such laws.

Revised Statutes of New Jersey of 1937 Title 1, Chapter 1, Par. 5

1:1-5. Classification and arrangement; effect on construction. The classification and arrangement of the several sections of the Revised Statutes have been made for the purpose of convenience, reference and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn therefrom.

Revised Statutes of New Jersey of 1937 Title 1, Chapter 1— Par. 5.1

1:1-5.1. Citation of, pleading or otherwise referring to legislation contained in Revised Statutes. The legislation contained within any title, sub-title, part, chapter, article, section or group of sections of these Revised Statutes may be cited, pleaded or otherwise referred to by reference to such title, subtitle, part, chapter, article, section or group of sections of the "Revised Statutes" containing such legislation; and the use of the words "Revised Statutes" shall have the same effect as if the legislative title under which these Revised Statutes were adopted and the approval date thereof had been used.

In any citation the abbreviation "R. S." shall be equivalent to "Revised Statutes", and sections of these Revised Statutes may be cited by section number only preceded by such abbreviation.